89-331 (1)

NO. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

ALBERT ALVIN CANO,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

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QUESTIONS PRESENTED

I. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE INTENTIONALLY DESTROYED THE SEIZED COCAINE AND A CRUCIAL TAPE RECORDING MADE BY POLICE WAS UNAVAILABLE, WHERE THIS EVIDENCE WOULD HAVE BEEN FAVORABLE TO THE DEFENSE?

II. WHETHER THE DEFENDANT WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE PROSECUTOR WAS PERMITTED TO REFER TO THE DEFENDANT'S ILLEGAL ALIENAGE AND SUGGEST THAT THE DEFENDANT'S FAMILY WAS INVOLVED IN DRUG TRAFFICKING?

III. WHETHER A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO HAVE THE JURY INSTRUCTED ON LESSER INCLUDED OFFENSES?

IV. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE REFUSED TO TREAT HIM IN THE SAME MANNER FOR PLEA AND SENTENCING PURPOSES AS HIS MORE CULPABLE DEFENDANT, AND WHEN THE COURT IMPOSED A DISPROPORTIONATE SENTENCE?

LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this case are the Petitioner, Albert Alvin Cano, his family, and the State of Alabama.

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NO. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

ALBERT ALVIN CANO,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

Petitioner, Albert Alvin Cano, petitions for a writ of certiorari to review the judgment and decision of the Alabama Court of Criminal Appeals, Fourth Division, in Case No. 4 Div.964, which affirmed his criminal conviction and sentence from the Houston Circuit Court. Cano v. State, 543 So.2d 724 (Ala.Crim.App. 1989).

OPINIONS BELOW

The Alabama Court of Criminal Appeals announced its decision on March 31, 1989. Cano v. State, 543 So.2d 724 (Ala.Crim.App. 1989). This decision is reproduced in the Appendix to this Petition. The trial court did not render any written opinions specifically directed to the questions presented in this certiorari petition.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3). For purposes of Supreme Court review, the Alabama Court of Criminal Appeals is the court of final review in Alabama criminal cases, and certiorari review in the Alabama Supreme Court is not available in this case, which does not involve any of the jurisdictional elements necessary for such review. Ala.R.App.P. 39(c).

CONSTITUTIONAL PROVISIONS INVOLVED

1. U.S. Constitution, Amendment V:

No person shall... be deprived of life, liberty, or property, without due process of law...

2. U.S. Constitution, Amendment VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

3. U.S. Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Albert Alvin Cano was indicted by the Houston County grand jury during its February 1981 term for trafficking in more than 400 grams of cocaine, in violation of Alabama Code §20-2-80, the Alabama Drug Trafficking Act. Indicted with Cano were Mauricio Noguera and Jimmy Talmadge Farrell. The indictment was returned on February 13, 1981. On April 24, 1981, the conditional forfeiture of Cano's bond was ordered due to his failure to appear for arraignment.

Cano was next located in Miami, Florida and brought back to the jurisdiction of the Houston County Circuit Court in May 1987. At that time, Cano's counsel filed a written plea of not guilty and a waiver of arraignment. Defense counsel filed a number of

pretrial motions, including a motion for disclosure of impeaching evidence, a motion to compel production, a motion to suppress evidence, and a motion to dismiss the indictment. Cano also requested "fair treatment" from the court by reason of codefendant Farrell having been permitted to plead to a reduced charge of cocaine possession. The court, through Circuit Judge Crespi, denied the motion for fair treatment and the motion to dismiss, but granted the discovery motion in part.

Jury trial began on September 15, 1987, before Circuit Judge Storey. At the opening of the trial, defense counsel moved for a dismissal because of the state's destruction of the seized cocaine and an undercover, surreptitious tape recording of a portion of the events giving rise to the charges, and because the state had failed to produce

all requested discovery in a timely fashion. The court, expectedly, denied the motion and the case proceeded to trial. During the prosecutor's opening statement, defense counsel was obligated to object on one occasion, but the reason for that objection does not appear in the appellate record because the defense was not allowed to supplement the requested transcripts with additional portions of the trial. At trial, the state called five witnesses, and then rested. The Defendant testified on his own behalf. The State called no rebuttal witnesses.

At the end of the evidence and argument, the court instructed the jury, but refused to instruct as to requested lesser offenses. The jury found Cano guilty as charged. Cano waived preparation of a presentence investigation report, and Judge

Storey immediately sentenced him to imprisonment for a period of twenty-one years, with a fifteen year minimum mandatory, and imposed a $250,000 fine.

Cano perfected his appeal. He also submitted an affidavit of financial hardship, resulting in the entry of an order authorizing preparation of a transcript at no cost to him. Cano raised five issues in that appeal, to wit: (1) a denial of due process when the State destroyed crucial evidence; (2) denial of a lesser included offense instruction; (3) fundamentally unfair comments by the prosecutor; (4) denial of fairness by reason of the refusal to permit supplementation of the appellate record with a missing transcript; and (5) denial of due process when the trial court refused to treat Cano in the same manner for sentencing purposes as the codefendant. The

appellate court, in a written decision, affirmed Cano's conviction and sentence. Cano v. State, 543 So.2d 724 (Ala.Crim.App. 1989).

As presented at trial, the events leading to this case began in early 1981, when undercover Alabama law enforcement officers succeeded in arranging the purchase of four pounds of cocaine in Houston County.[1/] The suppliers of the cocaine were Jimmy Farrell, a local resident with a history of controlled substance violations, Mauricio Noguera, and Cano.

James Ward, a member of the Alabama Bureau of Investigation, Narcotics Unit, investigated this case, together with ABI Officer Rhegness, Lt. Leroy Wood of the

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1/ The investigation was considered so important that Governor Fob James participated in the actual arrest for this largest cocaine seizure in Alabama. The jury was so informed of this irrelevant fact.

Houston County Sheriff's Department, and Bobby Sorrells and Wallace Williams of the Dothan Police Department. On January 2, 1981, Ward met with Bill Rhegness to discuss an undercover drug investigation. Both officers had been working in an undercover surveillance capacity, using pseudonyms for their undercover characters. The officers were working with a paid confidential informant named Will Johns, who introduced them to James Talmadge Farrell, a known drug dealer.

Johns had arranged a meeting with Farrell for that day at the Ramada Inn in Dothan. At that meeting, Ward met with a Colombian named Mauricio Noguera. Ward negotiated for the delivery of four kilograms of cocaine with Farrell, Johns, and Noguera, at a price of $55,000 per kilo. These negotiations were surreptitiously

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Johns had arranged a meeting with Farrell for that day at the Ramada Inn in Dothan. At that meeting, Ward met with a Colombian named Herricio Noguera. Ward negotiated for the delivery of four kilograms of cocaine with Farrell, Johns, and Noguera, at a price of $55,000 per kilo. These negotiations were surreptitiously

recorded by police monitoring equipment located in a nearby room. Ward displayed the money as a sign of good faith, which led to Noguera and Farrell explaining that they had to drive back to Tallahassee to pick up the cocaine.

Noguera and Farrell returned with Cano, who stated that he had driven "the drugs from Miami." Cano produced a cocaine sample. There was no testimony that Cano had taken this sample from the larger quantity of cocaine which had been negotiated by Noguera and Farrell. Rhegness field tested the substance as cocaine. Cano informed Ward that he had brought the contraband from Miami, but only had two kilograms with him. Because of the shortage in quantity, the total sale price was set at $110,000. The purchase price had been negotiated in the prior meeting.

Cano then left the room for the purpose of obtaining the cocaine, while Farrell stayed in the hotel room with Ward and Rhegness. Within minutes, Cano returned carrying a shopping bag containing two kilogram packages of cocaine wrapped in plastic. At this point, surveillance police officers quickly converged on the scene and arrested Cano and Farrell inside the room and Noguera at an outside telephone booth. Ward determined that Cano was a Colombian who did not have a United States visa, but he lived in Miami, Florida.

Rhegness took custody of the cocaine, and had it photographed. Those photographs were introduced into evidence as State's Exhibits One and Two.[2/]

[2/] The cocaine itself was never produced at trial. Rhegness had taken the cocaine to the crime lab for analysis, and on April 9, 1982, received a destruction of evidence authorization card from Chemist Saloom.

(continued...)

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[3] The cocaine itself was never produced at trial. Rhegness had taken the cocaine to the crime lab for analysis, and on April 6, 1987, received a destruction of evidence authorization form from Miami Police. (...continued)

Soon after their arrests, Cano and Noguera were released on bond. Circuit Court Clerk Trant testified at trial that Cano posted his bond on January 20, 1981, and his bond was forfeited on March 2, 1981. Cano was extradited from Miami and rearrested on May 1, 1987.

Alvin Cano testified on his own behalf at trial. He was born in Colombia and attended college in New York City. He first came to the United States with his family in 1965, and has been living in the United

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2/ (...continued)
Rhegness authorized the destruction of the cocaine, even though neither Cano nor Noguera had yet gone to trial. Lab policy was to retain evidence for two years. Saloom had analyzed the cocaine, and determined that the substance was 1,984 grams of cocaine. When he destroyed the cocaine, Saloom thought that the Noguera and Cano cases had been resolved. Saloom produced two different destruction authorization forms, although Saloom took the position that they were copies of a single form. No court ever authorized the destruction of the evidence.

States almost continuously since then. His visa permitted him to remain in the country.

Cano first met Noguera at a Christmas party in December 1980. Noguera went to college in Tallahassee, Florida. On New Year's Day, Cano's brother Cesar asked Cano if he would drive from Miami to Tallahassee for Noguera. Cano did so, and met with Noguera in Tallahassee, and there was introduced to Farrell. At Farrell's suggestion, the three of them drove to Dothan, which was a fifteen to twenty minute drive away. Cano had no idea he was going to Alabama. Upon their arrival at a hotel, Cano saw Rhegness and Ward for the first time. Cano knew at the time that drugs were being transported in the car, but had no intention of trafficking in drugs in Alabama.

At Farrell's request, Cano gave a cocaine sample to the undercover officers and told these prospective purchasers to talk with Farrell about the intended transaction. Cano then brought in the two kilogram packages of cocaine. Cano was arrested soon afterwards. He had never been involved with drugs before.

After his arrest and release on bond, Cano received permission to return to Fort Lauderdale, Florida. He didn't return to Alabama because his lawyer informed him that Noguera had fled and the judge wanted Cano to return to court immediately. Cano became scared and left the country. In 1987, he was extradited to Alabama from Miami.

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE INTENTIONALLY DESTROYED THE SEIZED COCAINE AND A CRUCIAL TAPE RECORDING MADE BY POLICE WAS UNAVAILABLE, WHERE THIS EVIDENCE WOULD HAVE BEEN FAVORABLE TO THE DEFENSE.

This case raises a fundamental question of the extent to which law enforcement authorities can destroy evidence and render evidence unavailable to the defense, when that destroyed evidence could have contributed to creating a reasonable doubt of his guilt. In this case, the prosecution charged Cano with trafficking in cocaine, and then limited its proof about the cocaine to testimony concerning the chemical analysis. The State did not produce the cocaine or make the cocaine available to Cano's counsel, because the contraband had been intentionally destroyed after Cano's arrest but before his trial. The des-

truction of all the seized cocaine was done contrary to the internal rule of the Alabama Bureau of Investigations, which permitted destruction only after two years from the date of the seizure. Also, the law enforcement authorities never sought permission of a court before destroying the evidence.

The prosecution also introduced testimony about a meeting between Cano, former codefendant Farrell, and two undercover officers. Although the meeting was recorded, the tape recording itself was "unavailable." Yet, the law enforcement officers were permitted to testify about that meeting, and stated that Cano discussed the cocaine sale and negotiated the sales price. Cano flatly denied that version at trial, taking the position that he had no negotiations with law enforcement officers, and that he had simply carried the bag con-

taining drugs at the direction of Noguera. Because the tape recording was "unavailable," Cano was unable to challenge the truth of the officers' testimony and could not present favorable evidence of his actual statements made during the meeting.

Based on the destruction and unavailability of these two crucial items of evidence, items which were featured as a major part of the prosecution's case, defense counsel moved to dismiss the charges or to obtain an order in limine precluding the prosecution from adducing any testimony concerning the missing evidence. The trial court denied that motion. On appeal, the court affirmed, based on its view that "the chances are very slim that the cocaine in this case was exculpatory" and that "the loss of the tape recording did not affect the outcome of this ... trial." By so

ruling, both the trial and appellate courts violated Cano's constitutional right to fundamental fairness and due process, particularly since the destruction and loss of this evidence left him with absolutely no means of challenging the prosecution's case or of introducing favorable evidence which would have changed the outcome of the trial.

The Due Process Clause of the Fourteenth Amendment requires that prosecution authorities disclose to criminal defendants favorable evidence that is material either to guilt or to punishment. United States v. Agurs, 427 U.S. 97, 96 S.Ct. 2392 (1976); Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963). Brady set forth the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or

punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196.

Application of this constitutional principle to the circumstances of this case requires the conclusion that Petitioner Cano's due process rights were violated when the State, by its own actions, rendered unavailable two crucial pieces of evidence, both of which very likely would have established Cano's innocence. In this case, defense counsel affirmatively demanded production of all tangible objects in the State's possession and all evidence taken from the Defendant, including the contraband and the tape recording. Not only did the State ignore this defense demand and a subsequent court order requiring the State to produce all discoverable evidence, it also disregarded an internal law enforcement

rule which obligated the police laboratory to retain evidence for two years from the date of seizure.

Since the State ignored the specific defense demand for this evidence and violated its own internal procedures concerning retention and availability of evidence, the constitutional principles enunciated in United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985), and United States v. Agurs, supra, compel a conclusion that the Alabama Court of Criminal Appeals disregarded controlling precepts in rejecting Cano's claim. Here, not only did the defense request evidence, but also the controlling Alabama procedure constituted an additional protection to a defendant. Since this procedure has the clear result of making evidence available to a defendant, so that the evidence can be used to de-

termine guilt or innocence, Cano was entitled to rely on established preservation and production practice.

The destroyed and unavailable evidence was essential to Cano's claim of innocence. Had the law enforcement officers retained the seized cocaine, the evidence would have demonstrated that Cano never handled or left fingerprints on the cocaine. Retention of the cocaine itself would have permitted Cano to demonstrate to the jury the percentage of substance that was actually cocaine, thus tending to negate the State's trafficking charge.

The unavailable tape recording would have demonstrated that Cano's trial testimony was absolutely correct, that he was a mere courier, had no specific knowledge that he was carrying two kilograms of cocaine, and never negotiated the cocaine tran-

saction. Of course, all the jury had, without the tape recording, was what the State argued as Cano's self-serving testimony. The tape recording not only would have corroborated Cano's testimony, but would have demonstrated that the testifying law enforcement officers were at least incorrect or more likely attempting to mislead the jury.

This Court has held that the customary practice of law enforcement officers in failing to preserve evidence for retesting by the defense does not constitute a denial of due process of law. California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528 (1984). That decision does not constitute a bar to Cano's present claim, because in this case the clear law enforcement practice, which was violated by the police, was to retain contraband and other evidence. The State

had thus established systematic procedures to preserve the captured evidence, unlike the facts in Trombetta, where there was no such preservation procedure and the failure to preserve breath samples was in accord with standard practice. In Cano's case, the destroyed and unavailable evidence possessed "an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendants would be unable to obtain comparable evidence by other reasonably available means." 467 U.S. at 489, 104 S.Ct. at 2534.

In summary as to this point, the Alabama Court of Criminal Appeals has placed a new gloss on the Due Process Clause of the Fourteenth Amendment, by allowing law enforcement officers to intentionally destroy or render unavailable evidence which is favorable to the defendant and which internal

police rules require be made available to the defense. Where the destroyed and unavailable evidence is essential to the defense case, and has been shown to have exculpatory value, the prosecution's failure to comply with a specific defense demand for that evidence constitutes a denial of due process.

Petitioner requests that this Court review the decision of the lower tribunal because of the important issue raised. This certiorari petition presents a critical opportunity for this Court to restore the constitutional principle of fundamental fairness to the criminal justice system. So that the concerns of the Framers of our Constitution are served, this Court must issue its writ of certiorari to correct the manifest injustice and error found herein.

II. THE DEFENDANT WAS DEPRIVED OF FUNDAMENTAL FAIRNESS WHEN THE PROSECUTOR WAS PERMITTED TO REFER TO THE DEFENDANT'S ILLEGAL ALIENAGE AND SUGGEST THAT THE DEFENDANT'S FAMILY WAS INVOLVED IN DRUG TRAFFICKING.

Alvin Cano was on trial for a single act of trafficking in cocaine, which occurred in January of 1981. During the trial, the prosecution was permitted to adduce evidence that Cano was an illegal alien, that his family was involved in cocaine trafficking in Colombia, and that Cano was a fugitive from justice. This evidence had no relevance to the charge for which Cano was on trial, other than to establish his bad character and propensity for committing criminal activity. The introduction of this collateral conduct was irrelevant to the case and unduly prejudicial to Cano's ability to mount a meaningful defense to the crime charged. It cannot be

doubted that Cano was convicted by the Alabama trial court jury because he was Colombian. Not only is that an inappropriate basis upon which a criminal conviction can be sustained, it is contrary to principles of fundamental fairness and due process.

No criminal defendant, whether a United States citizen or a foreign national, can be convicted of a crime for which the defendant is not on trial or which is not supported by competent evidence. See Marshall v. United States, 360 U.S. 310, 79 S.Ct. 1171 (1959). Where the prosecution is permitted to inflame the passions of the jury by referring to extraneous conduct, which is designed to show the jury that the defendant is a "bad man," the trial is inherently unfair. The use of this challenged evidence to prove Cano's criminal

propensity ran afoul of Justice Harlan's remarks in Boyd v. United States, 142 U.S. 450, 458, 12 S.Ct. 292, 295 (1892):

> However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

Although Cano asked for no more protection than that, the prosecution was permitted to play fast and loose with his constitutional rights. The prosecution should have been held to its burden of proving Cano's guilt of the crime charged. Instead the prosecution was permittted to convict Cano by assailing his character and by demonstrating his alleged propensity to commit bad acts, conduct which Cano contested. The appellate court concluded that admission of this evidence was not error, because certain portions were not objected

to and other portions were not harmful. In so ruling, the appellate court overlooked defense counsel's objection to the illegal alienage line of questions, which certainly preserved the issue for appellate review. Regarding the harmfulness issue, the lower tribunal failed to apply the harmless beyond all reasonable doubt standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824 (1967).

Petitioner submits that this court must review this due process issue within the context of the harmless error standard utilized by the Alabama Court of Criminal Appeals. Erroneous application of the constitutional harmless error standard by the lower tribunal essentially rejected any claim of constitutional error, and suggests that an error can be deemed harmless even when there is no determination that it is

harmless beyond all reasonable doubt. State appellate courts should not be permitted to apply constitutional principles in a manner which causes disharmony with controlling Supreme Court precedent. Because Petitioner was denied his constitutional right to due process, as guaranteed by the Fourteenth Amendment to the United States Constitution, and the appellate court completely disregarded that position, this court should accept this case for certiorari review and correct the injustice found herein.

III. A DEFENDANT IN A CRIMINAL CASE IS ENTITLED TO HAVE THE JURY INSTRUCTED ON LESSER INCLUDED OFFENSES.

Cano was charged with one of the most serious violations of Alabama law: trafficking in more than 400 grams of cocaine. This offense, upon conviction, requires a mandatory minimum sentence of 15 years imprisonment. Notwithstanding the defense

request that the jury be instructed on the lesser included offense of possession of cocaine, an offense which carries a much less severe penalty, the trial court declined to so instruct the jury. The jury thus had but one offense upon which to deliberate Cano's fate: guilty or not guilty of trafficking. The appellate court affirmed Cano's trafficking conviction, finding that "there was no rational basis for a charge on the lesser included offense of possession of cocaine." By so ruling, the Alabama Appellate Court deprived Cano of due process by limiting his right to have the jury instructed on all applicable points of law.

Under Alabama law, the offense of trafficking in cocaine includes the lesser included offense of possession. Ex parte Kerr, 474 So.2d 145 (Ala. 1985). While that

legal point is abundantly clear, the lower tribunal concluded that a lesser included instruction was unavailable to Cano because he admitted to possessing the small amount and the larger amount of cocaine. This is an inaccurate and inappropriate conclusion, since the trial record reflects that while Cano handled two separate quantities of cocaine, it was only his possession of the small seven gram sample which was knowingly and intentionally entered into. It should have been for the jury to determine whether Cano merely knowingly possessed the sample, or whether Cano knowingly trafficked in the nearly two kilograms of cocaine.

Due process requires that a defendant in a criminal case receive instructions on lesser included offenses. See Beck v. Alabama, 447 U.S. 625, 638, 100 S.Ct. 2382, 2390 (1980)(lesser included offense ins-

tructions in capital cases is a matter of federal constitutional law); Rembert v. Dugger, 842 F.2d 301, 303 (11th Cir. 1988). While this rule is plain in capital cases, this Court explicitly left open the question of whether due process required lesser included instructions in non-capital cases. 447 U.S. at 638 n. 14, 100 S.Ct. at 2390 n. 14. Subsequent cases from the Court defining Beck have not addressed the question. See, e.g., Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154 (1984); Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049 (1982).

The instant case is the ideal vehicle for resolving the open question of whether due process requires lesser included instructions in non-capital cases. There is no doubt that under Alabama law, the offense of possession of cocaine is a lesser included offense of trafficking in cocaine.

Kerr, supra. Yet, the Alabama courts failed to adhere to controlling law when Cano was denied the opportunity to have the jury consider his guilt in the context of the charged offense and the lesser included offense. Since the facts are such that a jury could have found that Cano merely possessed the smaller quantity of cocaine as opposed to having trafficked in the larger amount of cocaine, Cano was denied his due process protections. Only this Court can resolve this question by accepting this case for certiorari review.

IV. PETITIONER WAS DENIED DUE PROCESS OF LAW AND FUNDAMENTAL FAIRNESS WHEN THE STATE REFUSED TO TREAT HIM IN THE SAME MANNER FOR PLEA AND SENTENCING PURPOSES AS HIS MORE CULPABLE CODEFENDANT, AND WHEN THE COURT IMPOSED A DISPROPORTIONATE SENTENCE.

In this case, when the prosecuting attorney refused to allow Petitioner to enter a plea to the same reduced charge as

his codefendant, Cano was compelled to go to trial, resulting in his conviction for cocaine trafficking and a 21-year sentence. By contrast, codefendant Farrell had been permitted to plead to a reduced cocaine possession charge and received a 10-year sentence. Farrell was not even required to provide substantial assistance to law enforcement and did not testify at Cano's trial.

The conduct of the prosecution in its double standard treatment of Cano is constitutionally suspect. The resulting sentence imposed on Cano, which more than doubles the incarceration imposed upon the more culpable codefendant, is constitutionally disproportionate, especially since the codefendant received a parolable sentence, and Cano must serve his 21 years without eligibility for parole.

When a claim of disproportionality is raised by a defendant, a court is to consider the gravity of the offense and the harshness of the penalty, the sentences imposed on other criminals in the same jurisdiction, and the sentences imposed for commission of the same crime in other jurisdictions. Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001 (1983). It is apparent that the lower tribunal failed to adhere to these criteria, since there is no constitutional way to justify Cano's heavy sentence when contrasted with the sentence imposed upon his more culpable codefendant. Although the gravity of the offense (trafficking in drugs) is harsh, the sentences imposed on similarly situated offenders, like Farrell, are minimal by comparison. Additionally, 21-year terms of imprisonment are not routine for possession of 2 kilograms of cocaine.

It appears that the only basis for a sentence this harsh is to speculate that Cano was penalized for going to trial. In that case, there can be little doubt that Cano's treatment and sentence is unquestionably unconstitutional. See United States v. Underwood, 588 F.2d 1073, 1078 (5th Cir. 1979). In order to remedy this unconstitutional and disproportionate treatment among similarly situated offenders, this Court should accept this case for certiorari review. This case will provide this Court with a vehicle to evaluate claims by state criminal defendants that they were mistreated at the hands of the prosecution and the court by being subjected to different treatment than their codefendants for no valid reason.

CONCLUSION

For the reasons stated, this Court should grant a writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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APPENDIX

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THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1988-89

4 Div. 964

ALBERT ALVIN CANO

v.

STATE

Appeal from Houston Circuit Court

TYSON, JUDGE

Albert Alvin Cano was indicted for trafficking in cocaine in violation of §20-2-80, Code of Alabama 1975. The jury found the appellant "guilty as charged in the indictment." The appellant was sentenced to 21 years imprisonment with a 15-year minimum mandatory sentence and fined $250,000.

James G. Ward, an investigator with the narcotics unit of the Alabama Bureau of

Investigation, testified that he was involved in undercover narcotics operations in Dothan, Alabama, in December of 1980 and January of 1981. On December 30, 1980, Ward received information from an informant, Will Johns, that he was to meet James Talmadge Farrell on January 2, 1981 at the Ramada Inn in Dothan. On that day at approximately 12:40 p.m., Investigator Bill Rhegness and Johns went to Room 160 at the Ramada Inn and met with Farrell and Mauricio Noguera.

Several officers with local law enforcement agencies were in Room 161 monitoring the conversations in Room 160. Ward told Farrell he wanted to purchase four kilos of cocaine and a price of $220,000 was agreed upon. Ward showed Farrell and Noguera $50,000 and told them the rest of the money was in another room and it would be delivered when the deal was completed.

Farrell and Noguera told Ward and Rhegness that they had to go to Tallahassee, Florida to pick up the drugs and they would return as soon as possible.

At 5:10 p.m., Farrell returned to Room 160 accompanied by the appellant. Noguera was not with them. The appellant produced a plastic bag with approximately seven grams of a white powdery substance. Rhegness tested the substance and the test was positive for cocaine. The appellant stated he had brought the cocaine from Miami, Florida, but that he only had two kilos. A price of $110,000 was negotiated for the two kilos of cocaine. The appellant then asked Ward or Rhegness to accompany him to his car to get the rest of the cocaine. When Ward replied that he and Rhegness were not leaving, the appellant left the room and returned with a shopping bag. The appellant

dumped two kilos of cocaine from the shopping bag onto the bed. One of the kilos was checked for cocaine by Rhegness and the test was positive. Farrell and the appellant were then placed under arrest. Noguera was arrested at a phone booth in front of the Ramada Inn.

Joseph Saloom, a criminalist with the Department of Forensic Sciences, testified that he received three bags containing a white substance from Rhegness. This substance was determined to be cocaine. The total weight of the cocaine was 4.37 pounds or 1984.76 grams.

The appellant testified that he was living in Miami, Florida in December of 1980. On Christmas Even, he met Noguera for the first time at a party. The appellant understood Noguera was a student living in Tallahassee.

On January 1, 1981, the appellant's brother, whom the appellant knew was a drug dealer, asked the appellant to drive a rented car containing cocaine to Tallahassee to meet Noguera. The appellant was to receive $1,500 for the trip.

On January 2, 1981, the appellant left Miami and arrived in Tallahassee at around 4:00 p.m. When the appellant arrived at Noguera's apartment, Noguera made a phone call. Farrell came to the apartment a few minutes later. Noguera told the appellant they had to go somewhere and for him to come along. The appellant rode with Farrell in his car and Noguera followed in the rented car. Once they arrived at the Ramada Inn in Dothan, Noguera told him to go with Farrell and show a sample of the cocaine to Ward and Rhegness.

The appellant broke open a package of the cocaine that he had brought and removed seven grams. When the appellant showed Ward the seven grams of cocaine, Ward started asking about four kilos of cocaine. The appellant replied that he was tired and that he only had two kilos. When Ward agreed to accept the two kilos, the appellant went outside to get the bag which contained the rest of the cocaine and gave it to Ward and Rhegness. The appellant was to receive $100,000 for the cocaine from Farrell to give to his brother in Miami, Florida.

I
(A)

The appellant contends his case should have been dismissed by the trial court because the cocaine was destroyed prior to trial without his knowledge or consent.

At trial, Investigator Ward testified that he received a card from Joseph Saloom

The appellant broke open a package of the cocaine that he had brought and removed seven grams. When the appellant showed Ward the seven grams of cocaine, Ward started asking about four kilos of cocaine. The appellant replied that he was tired and that he only had two kilos. When Ward agreed to accept the two kilos, the appellant went outside to get the bag which contained the rest of the cocaine and gave it to Ward and Rhagnese. The appellant was to receive $150,000 for the cocaine from Ferrell to give to his brother in Miami, Florida.

II

(A)

The appellant contends his case should have been dismissed by the trial court because the cocaine was destroyed prior to trial without his knowledge or consent.

At trial, investigator Ward testified that he received a call from Joseph Haines

asking if the cocaine in this case should be maintained or destroyed. Ward replied to Saloom that it should be destroyed. Ward testified that the street value of this cocaine was $1,000,000.

Saloom testified that the cocaine was destroyed in 1982 after he received permission from Ward. He stated that the policy of the Department of Forensic Sciences was to maintain evidence for a period of two years unless otherwise indicated. The jury heard this evidence.

In arguing his motion to dismiss prior to trial, defense counsel stated he asked the district attorney for the cocaine in the summer of 1987, a few months prior to trial. At this time, defense counsel was informed that the cocaine had been destroyed. Defense counsel indicated he wanted

the cocaine so that he could weigh it and test it for the presence of cocaine.

> "The Due Process Clause of the fourteenth Amendment, as interpreted in Brady, makes the good or bad faith of the State irrelevant when the State fails to disclose to the defendant material exculpatory evidence. But we think the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant. Part of the reason for the difference in treatment is found in the observation made by the Court in Trombetta, supra, 467 U.S., at 486, 104 S.Ct., at 2532, that '[w]henever potentially exculpatory evidence is permanently lost, courts face the treacherous task of divining the import of materials whose contents are unknown and, very often, disputed.' Part of it stems from our unwillingness to read the 'fundamental fairness' requirement of the Due Process Clause, see Lisenba v. California,

> 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166 (1941), as imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution. We think that requiring a defendant to show bad faith on the part of the police both limits the extent of the police's obligation to preserve evidence to reasonable bounds and confines it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant. We therefore hold that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."

The appellant contends that Investigator Ward's intentional destruction of the cocaine, within the two-year time period that DFS usually maintains evidence, was an

indication of a bad faith motive by Ward. We disagree.

It appears from the record that the cocaine was destroyed due to its $1,000,000 street value. This court is of the opinion that this was a valid reason for the destruction of the cocaine and we can find no evidence of any bad faith motive on the part of the police or the prosecution in this case involving the destruction of the cocaine at issue.

Moreover, the record indicates that the appellant jumped bail and fled the State shortly after his arrest in 1981 and he was not returned to this State until 1987. The cocaine was destroyed during the time when the police did not know where to locate the appellant. Although trial counsel represented the appellant in 1981, he did not

request a sample of the cocaine until he contacted the district attorney in 1987.

Even if the cocaine had been maintained for a two-year period according to DFS procedure, the cocaine would have been routinely destroyed long before the 1987 date of his motion.

Furthermore, we note that the chances are very slim that the cocaine in this case was exculpatory to the appellant, particularly in light of his testimony at trial. The appellant admitted the substance he gave to Ward and Rhegness was cocaine and he referred to the amount of the cocaine as two kilos. There was also evidence that Rhegness tested the substance in the Ramada Inn room and it tested positive for cocaine.

Thus, we find the trial court correctly denied the appellant's motion to dismiss.

(B)

The appellant also contends that Ward's and Rhegness's testimonies concerning their conversation with the appellant in the motel room should not have been admitted into evidence because a tape recording of that conversation had been lost prior to trial. The appellant claims that the unavailability of the tape recording violates the principles set out in Brady v. Maryland, 373 U.S. 83, 87 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

> "Essential to a claim under Brady is a showing that (1) the government suppressed or withheld requested evidence that was both (2) favorable and (3) material to the defense. Moore v. Illinois, 408 U.S. 786, 794-95 S.Ct. 2562, 2568-69, 33 L.Ed.2d 706 (1972). United States v. Walker, 720 F.2d 1527 (11th Cir. 1983), cert. denied, 465 U.S. 1108, 104 S.Ct. 1614, 80 L.Ed.2d 143 (1984).
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>
> "...

> "'[T]he standard of materiality is whether the suppressed evidence might have affected the outcome of the trial. [United States v.] Agurs, 427 U.S. [97] at 104-06 [96 S.Ct. 2392 at 2397-98, 49 L.Ed.2d 342 (1976)]; United States v. Blasco, 702 F.2d 1315, 1327 (11th Cir. 1983).' Walker, supra at 1535. (Footnote omitted.)"

Crawford v. State, 485 So.2d 391, 396 (Al. Cr. App. 1986).

At trial, the appellant, as well as Ward and Rhegness, was allowed to testify about the conversation which took place in the motel room. There were very few differences between the investigators' versions of the conversation and the appellant's version and such differences were insignificant. The jury was able to hear all of this evidence, and thus, we find that the loss of the tape recording did not affect the out-

come of this appellant's trial. See Crawford.

Furthermore, these tapes were lost during the six year period when the appellant had voluntarily absented himself from this State. He was responsible for the length of time between his arrest and trial, during which these tapes were lost.

II

The appellant contends the trial court erred by denying his oral request for an instruction to the jury on possession of cocaine as a lesser included offense. In Ex parte Kerr, 474 So.2d 145 (Ala. 1985), the Alabama Supreme Court held that,

> "Conduct proscribed by §20-2-70 [possession] is clearly a lesser offense included in the criminal conduct addressed in §20-2-80 [trafficking]; and a jury instruction to that effect is required, where requested, if any reasonable theory of the evidence

case of this appellant's trial. See Grant-

[illegible].

Furthermore, these tapes were lost during the six year period when the appellant had voluntarily absented himself from this state. He was responsible for the length of time between his arrest and trial, during which these tapes were lost.

II

The appellant contends the t[rial] court erred by denying his oral request for an instruction to the jury on possession of cocaine as a lesser included offense. In Ex parte Oliver, 518 So.2d 705 (Ala. 1987), the Alabama Supreme Court held that,

> "Conduct proscribed by § 13A-12-212 (possession) is clearly a lesser offense included in the criminal conduct addressed in § 13A-12-231 (trafficking), and a jury instruction to that effect is required, where the evidence is any reasonable theory of the evidence

> supports a finding of the lesser offense."

Kerr, 474 So.2d at 147.

In Kerr, the defendant was stopped in his car by a police officer. The officer found an open pouch of marijuana on the front seat next to the defendant. The officer also found a large quantity of marijuana in a duffel bag in the trunk of the defendant's car. The defendant in Kerr admitted possession of the marijuana found on the front seat (the quantity of which was less than the amount required for trafficking) but denied any knowledge of the marijuana found in the trunk (the quantity of which was greater than the amount required for trafficking).

The Supreme Court held that a charge on the lesser included offense of possession of marijuana should have been given in Kerr because

> "... [i]f the instant jury had believed the accused's defense theory - that he possessed the quantity of marijuana found beside him on the car seat and that he had no knowledge of the contents of the duffel bag in the trunk - it would have been justified in returning a verdict of guilty pursuant to §20-2-70. Here, the evidence would support a finding under either §20-2-70 or §20-2-80."

Kerr, 474 So.2d at 146.

The facts of this case are easily distinguished from those in Kerr. In Kerr, the defendant admitted possession of the small quantity of marijuana but denied knowledge of the larger quantity. Here, the appellant admitted he possessed and delivered both the small quantity of cocaine (the seven gram sample) and the larger quantity of cocaine (the two kilos).

The appellant seems to argue that an instruction on possession of cocaine should

have been given because he did not intend to "traffick" in the two kilos of cocaine. He asserts that he was merely delivering the cocaine for Noguera due to a "last minute request." This argument is meritless.

"Any person who knowingly sells, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine... is guilty of... 'trafficking in cocaine.'" Ala. Code §20-2-80(2) (1975).

The appellant admitted being in actual possession of the seven gram sample of cocaine and the two kilos (more than 1900 grams) of cocaine. There is absolutely no evidence to the contrary.

"A defendant who is accused of the greater offense is entitled to have the court charge on the lesser offenses included in the indictment, if there is any reasonable

theory from the evidence, which would support the position." Kerr, 474 So.2d at 146 (quoting Fulgham v. State, 291 Ala. 71, 277 So.2d 886 (1973)).

There is no evidence in the record that the appellant knowingly possessed the smaller quantity of cocaine but not the larger amount. Thus, there was no rational basis for a charge on the lesser included offense of possession of cocaine. The trial judge correctly denied the request for this charge.

III

The appellant contends reversible error occurred in this case because "the prosecution was permitted to adduce evidence that Cano was an illegal alien (R. 255-256), that his family was involved in cocaine trafficking in Columbia (R. 293) and that he was

theory from the evidence, which would sup-
port the position." Kerr, 474 So.2d at 144
(quoting Fulcher v. State, 381 Ala. 73, 277
So.2d 886 (1973)).

There is no evidence in the record that
the appellant knowingly possessed the meth-
lor quantity of cocaine but not the larger
amount. Thus, there was no rational basis
for a charge on the lesser included offense
of possession of cocaine. The trial judge
correctly denied the request for this
charge.

III

The appellant contends reversible error
occurred in this case because the possess-
ion was permitted to adduce evidence that
Cano was on illegal alien [R. 219-222], that
his family was involved in cocaine traff-
icking in Colombia [R. 223] and that he was

a fugitive from justice." Appellant's brief, p. 16.

During the prosecutor's cross-examination of the appellant, the following occurred:

"Q Mr. Cano, how long were you in Miami?
"A When was that?
"Q From the time -- from January 1, 1981, going back.
"A Well, I arrived in that particular year -- I arrived more or less in September, 19 -- August, September, 1980.
"Q Were you admitted to the country legally at that time, Mr. Cano? You were not, were you?
"A Well, if you let me explain.
"Q No, sir, just answer my questions.

> "MR. SALTER: Objection, may it please the Court. This goes to other matters indicating other criminal conduct not charged in the indictment. I think the defendant ought to be allowed to explain because being in this country legally and illegally is --
>
> "THE COURT: Allow him to explain, Mr. Valeska." (R. 255-56).

This court can only review matters on which rulings have been invoked at the trial

court level. Moore v. State, 457 So.2d 981 (Ala. Cr. App. 1984).

Here, the appellant did not receive or ask for an adverse ruling. In fact, the trial judge did precisely what defense counsel asked - i.e., he allowed the appellant to explain his answer. Furthermore, evidence of this same character was admitted without objection at other points in the trial. (See R. 99, 289, 304.).

The following portion of the transcript also occurred during the cross-examination of the appellant.

"Q What happened to Cesar?
"A Cesar die in 1985.
"Q Killed in Columbia; right?
"A Correct.
"Q Over drugs, right? In a drug war, did you not testify to that earlier, Mr. Cano?
"A Well, I didn't say that it was a drug war.
"Q Did you say it was over drugs, Mr. Cano?
"A It was not really over drugs. It was that somebody stole something from him and they just killed him." (R. 290-91).

Defense counsel did not object to the prosecutor's question, and, thus, this issue is not preserved for our review. Bell v. State, 466 So.2d 167 (Ala. Cr. App. 1985).

Furthermore, we fail to see how the appellant was harmed by the prosecutor's question because the appellant had already admitted that his brother was a drug dealer (R. 271), and he replied in the negative to the prosecutor's question.

The appellant's assertion that the trial court erred by admitting evidence that the appellant was a fugitive from justice is not before this court for review. The appellant never objected to the admission of this evidence, and, thus, this issue has not been properly preserved for appellate review. Bell.

IV

On July 19, 1988, the appellant filed with this court a "Motion for Remand to the Circuit Court for an Evidentiary Hearing." In his motion, the appellant alleged the following:

> "2. Appellant submits that a critical issue in this appeal will be the propriety of certain remarks made by the prosecutor during the State's opening and closing arguments.
>
> "3. During arguments, the District Attorney referred to Appellant as a 'merchant of death' and that Appellant was responsible for the 'killing of children.' (Other improper remarks were also made). At least some of these prejudicial comments were objected to by Appellant's counsel. Attached hereto as Exhibit 'A" are the excerpts from the trial transcript reflecting the opening and closing arguments." (Emphasis added.)

IV

On July 20, 1988, the appellant's motion was denied by this court. On appeal, the appellant urges this court to reconsider its denial of the "Motion to Remand to the Circuit Court for an Evidentiary Hearing." This issue is without merit and it is unnecessary to remand this case for an evidentiary hearing.

Rule 21(b), A.R.Crim.P.Temp. provides that "In all non-capital cases, the court reporter shall take full stenographic notes of the arguments of counsel <u>if directed to do so by the judge</u>." (Emphasis added.) If the judge does not direct the court reporter to take notes of the arguments of counsel, as here, then,

> "The official court reporter shall attend in person, except as otherwise herein provided, the sessions of court held in the circuit for which he is appointed, and in every case, where directed by the judge or requested by a

> party thereto, he shall take full stenographic notes of the oral testimony and proceeding, except argument of counsel, and note the order in which all documentary evidence is introduced, all objections of counsel, the rulings of the court thereon and exceptions taken or reserved thereto."

Ala. Code, §12-17-275 (1975) (emphasis added).

> "'The official court reporter is not required to transcribe the argument of counsel except where objection is made. McClary v. State, 291 Ala. 481, 282 So.2d 384 (1973); Langford v. State, 354 So.2d 297 (Ala. Cr. App. 1977), rev'd on other grounds, 354 So.2d 313 (Ala. 1977); Ala. Code §12-17-275 (1975).' Ervin v. State, 399 So.2d 894, 898 (Ala. Cr. App. 1981), cert. denied, 399 So.2d 899 (Ala. 1981). Any remarks made by the prosecutor which the appellant considers objectionable should be fully quoted, or substantially so, by objection. Id.
>
> "'It is incumbent upon counsel, where he makes objection

party thereto, he shall take full stenographic notes of the oral testimony and proceeding, except argument of counsel, and note the order in which all documentary evidence is introduced, all objections of counsel, the rulings of the court thereon and exceptions taken or reserved thereto."

Ala. Code, §12-17-275 (1975) (emphasis added).

"'The official court reporter is not required to transcribe the argument of counsel except where objection is made. McClary v. State, 291 Ala. 461, 282 So.2d 384 (1973); Lanford v. State, 356 So.2d 793 (Ala. Cr. App. 1977), rev'd on other grounds, 356 So.2d 797 (Ala. 1977); Ala. Code §12-17-275 (1975).' Akins v. State, 399 So.2d 894, 898 (Ala. Cr. App. 1981), cert. denied, 399 So.2d 899 (Ala. 1981). Any remarks made by the prosecutor which the appellant considers objectionable should be fully quoted, or substantially so, by objection. Id.

"'It is incumbent upon counsel, whether he makes objection

> to the closing argument, to specifically state and present to the attention of the trial court by proper objection such argument and the court's ruling thereon in order that the court reporter be able to transcribe same and include this in the record on appeal... Moreover, where, as here, the appellant is not an indigent, it is incumbent upon counsel, if he desires the complete closing argument transcribed, to bring in a court reporter and have same done, or to pay the reporter for transcribing the complete closing argument.'"

"Briggs v. State, 375 So.2d 530, 535 (Ala. Cr. App. 1979)."

to the closing argument, to specifically state and present to the attention of the trial court by proper objection such argument and the court's ruling thereon in order that the court reporter be able to transcribe same and include this in the record on appeal. . . However, where, as here, the appellant is not an indigent, it is incumbent upon counsel, if he desires the complete closing argument transcribed, to bring to a court reporter's attention that he desires the closing argument to be transcribed and make arrangements for transcribing the complete closing argument. . ."

Tolliver v. State, 275 So.2d 353, 354 (Miss. App. 1973).

Reeves v. State, 518 So.2d 168, 171 (Ala. Cr. App. 1987).

The few objections made by counsel during argument were fragmentary in nature. The record does not contain any of the comments allegedly made by the prosecutor which the appellant asserts were improper. "It is the duty of counsel urging error in closing [or opening] argument to be certain that the full language, deemed objectionable, is set forth so that the propriety of same is preserved in the record." Ragsdale v. State, 448 So.2d 442 (Ala. Cr. App. 1984) (citations omitted). The appellant failed to do this, and thus, there is nothing before this court to review.

V

The appellant, in his supplemental brief to this court, contends that his sentence

was disproportionate to the sentence received by his co-defendant, Farrell.

The appellant received a 21-year sentence in this case. Farrell pleaded guilty to possession of cocaine and received a 10-year sentence.

This court, in a similar fact situation, has previously addressed and adversely decided this issue to this appellant. See Maddox v. State, 502 So.2d 790 (Ala. Cr. App. 1986), cert. denied, 502 So.2d 794 (Ala. 1987). Applying the legal principles we set out in Maddox to the facts of this case, we find that the appellant's sentence was not disproportionate.

For the reasons shown, the judgment of the trial court is due to be, and it is hereby, affirmed.

AFFIRMED.

All Judges Concur.